

STATE OF MICHIGAN
COURT OF APPEALS

NATIONAL CITY BANK OF
MICHIGAN/ILLINOIS, N.A. f/k/a FIRST OF
AMERICA,

UNPUBLISHED
January 28, 2003

Plaintiff-Appellee,

v

GENE HAYDEN,

No. 234045
Wayne Circuit Court
LC No. 00-035935-AV

Defendant-Appellant.

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

JANSEN, J. (*dissenting.*)

I respectfully dissent because I do not believe that the circuit court erred in affirming the district court's denial of defendant's motion to set aside the default judgment entered against him and to reinstate his counterclaim. I would affirm.

As the majority notes, we review the trial court's decision to grant or deny a motion to set aside a default judgment for an abuse of discretion. *Alken-Ziegler v Waterbury Headers*, 461 Mich 219, 227; 600 NW2d 638 (1999). An abuse of discretion "occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Id.* (citations omitted).

Although Michigan law favors the determination of claims on the merits, the policy of this state is generally against setting aside properly entered default judgments. *Id.* at 229. Under MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed."

In seeking reversal of the default judgment, defendant first argues that the district court relied on impermissible grounds when denying his motion to set aside the default judgment. In particular, defendant points to the following statements made by the district court:

It's interesting to note that when we want to know—when we want to use the court rules for our benefit we use them. And when we look at the court rules and we don't use them, and we don't do what we're supposed to do in filing

various things and appearing when you're supposed to appear, then it's a different story.

But it appears to me that Nat—the Plaintiff, National City Bank, has done everything they can to properly prosecute this matter and has been running into problems because of defense counsel. I'm going to deny the motion to set aside the default judgment.

Defendant claims that these comments illustrate the fact that the district court denied his motion simply because plaintiff's counsel had "been running into problems because of defense counsel" and did not decide his motion on the basis of good cause and the filing of a meritorious defense, MCR 2.603(D)(1). I disagree.

When considering the district court's statements in context, it is clear that the district court did, in fact, consider the factors mandated by MCR 2.603(D)(1). The district court made its ruling on the record after hearing discussions between the parties both in open court and in chambers. Addressing defendant's good cause claim on the record, the district court admonished defense counsel for its violation of the court rules when she failed to appear for a pretrial conference in violation of MCR 2.401. Specifically, defense counsel told plaintiff's counsel that a motion to set aside default had been scheduled on August 16, 2000. Plaintiff's attorney appeared for the hearing, but discovered that no such motion had been filed. In this instance, the district court denied defendant's motion to set aside the default judgment because defense counsel violated the court rules and wasted plaintiff's counsel's time on two occasions, not because plaintiff's counsel had run into problems with defense counsel.

In addition, defendant cannot show good cause. In the context of a motion to set aside a default judgment, good cause is satisfied by a showing of "a procedural irregularity or defect," or "a reasonable excuse for failure to comply with the requirements that created the default" *Id.* at 233.

Defendant argues that he has shown good cause to set aside the default judgment because he was not promptly notified that a default had been entered against him, as required by MCR 2.603(A)(2)(a). "Failure to notify a party of an entry of default constitutes a violation of MCR 2.603(A)(2) and is sufficient to show a substantial defect in the proceedings meriting a finding of good cause pursuant to MCR 2.603(D)." *Bradley v Fulgham*, 200 Mich App 156, 158-159; 503 NW2d 714 (1993). However, this Court has also ruled that the irregularity in the proceedings, to constitute good cause, must prejudice the defaulted party. *Alycekay Co v Hasko Const Co*, 180 Mich App 502, 506-507; 448 NW2d 43 (1989).

In this case, defendant cannot show that he was prejudiced. The purpose of the notice provision under MCR 2.603(A)(2) is to enable the defaulted party to choose whether to move to set aside the default. *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358; 514 NW2d 257 (1994). Here, defense counsel was aware of the default one day after defendant was defaulted on August 2, 2000. On August 3, 2000, defense counsel phoned plaintiff's counsel to inform him of a non-existent motion to set aside the default later that month. Thus, even assuming that defendant had not received the notice mandated by MCR 2.603(A)(2), he knew that a default had been entered against him and was able to move to set it aside. Because defendant has not shown prejudice, he has failed to establish good cause based on an irregularity in the proceedings.

Good cause can also be shown if the defaulted party shows “a reasonable excuse for failure to comply with the requirements that created the default” *Alken-Ziegler, supra*, 461 Mich 233. In this case, defense counsel’s excuse for failing to appear at the pre-trial conference was negligence, i.e., the failure to calendar the date. This is an insufficient basis to establish good cause. See *Park v American Casualty Ins*, 219 Mich App 62, 67; 555 NW2d 720 (1996) (“An attorney’s negligence is attributable to the client and normally does not constitute grounds for setting aside a default judgment.”) Therefore, defendant failed to establish good cause based on a reasonable excuse for failure to abide by the requirement that created the default.

Finally, when looking at the entire record, it is clear that the circuit court did, in fact, apply the appropriate standard of review in affirming the district court’s denial of defendant’s motion to set aside the default judgment. The circuit court stated that to find an abuse of discretion, it must find that the district court “ruled perversely” This is a correct formulation of the abuse of discretion standard. *Alken-Ziegler, supra*, 461 Mich 227. Thus, by ruling that it “cannot find, using the standard, that [the district court] abused his discretion,” the circuit court did not err in affirming the district court’s denial of defendant’s motion to set aside the default judgment and reinstate his counterclaim. Accordingly, I would affirm.

/s/ Kathleen Jansen